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No. 553

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IN THE

Supreme Court of the United States

October Term, 1963.

HARRY FINCH and JAMES THIELE,
Petitioners;

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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LONG-BEACH REPORTER

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HARRY FINCH and JAMES THIELE,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioners HARRY FINCH and JAMES THIELE respectfully pray that the Supreme Court grant a writ of certiorari to review the Judgment of the Supreme Court of California, entered on July 17, 1963, denying a hearing in that court from a judgment of the District Court of Appeal affirming the judgment of the Superior Court of Los Angeles County of the State of California, convicting them of conspiracy to commit bribery and extortion, and present this statement to show that the Supreme Court of the United States has jurisdiction of this petition and that a substantial federal question exists.

Opinion Below

The opinion of the District Court of Appeal is reported in 216 ACA 495, 30 Cal. Rptr. 901, a copy of

which is attached as Appendix A hereof. The hearing was denied by the California Supreme Court without an opinion.

Jurisdiction

The decision of the District Court of Appeal was filed on May 21, 1963. A petition for hearing by the Supreme Court of California was denied on July 17, 1963. The jurisdiction of this Court is invoked under 28 U.S. Code, Section 1257 (3). The constitutional question was originally raised and assigned as error to the said District Court of Appeal, which ruled thereon. (Appendix A).

Questions Presented

1. Did the State of California deprive petitioners of due process of law and of a fair trial upon their trial for bribery and conspiracy to commit bribery and extortion by allowing the District Attorney to interrogate, impeach, and denounce petitioners' sole corroborating witness because he had claimed the privilege against self-incrimination when subpoenaed as a witness before a County Grand Jury that was hearing evidence against petitioners, and by attacking the witness as a liar and a perjurer because he had "claimed the Fifth?"

2. Should the Fifth Amendment privilege against self-incrimination be made applicable to the state's courts?

Constitutional Provisions Involved

The Federal constitutional provisions involved are the Fifth and Fourteenth Amendments to the U.S. Constitution.

Statutory Provisions Involved

Statutes involved are Article 1, Sec. 13 of the Constitution of the State of California, and Sections 688 and 1323 of the Penal Code of the State of California. (Appendix B)

Statement of the Case

Petitioners were two police inspectors of the City of Long Beach, California. Two other policemen reported to one of their superiors, a police lieutenant, that petitioners had solicited them to extort money from a doctor under threats of arresting him for committing abortions. The lieutenant instructed them to feign agreement for the purpose of acquiring evidence against petitioners which they, thereafter, did in collaboration with certain deputies assigned by the County Sheriff. Petitioners claimed at the trial by way of defense that the said two police officers had solicited *them* to accept these bribes and that they had reported the matter to the head of their department, Captain Lorin Martin, an officer who was over Lt. Black, and who, they claimed instructed them to feign agreement for the purpose of acquiring evidence *against the two other officers.*

Thereafter, an investigation into the matter was launched by the Grand Jury of Los Angeles County. Capt. Martin was subpoenaed as a witness against petitioners and refused to testify on the ground that he might incriminate himself and "claimed the Fifth Amendment" upon advice of counsel.

Upon the trial of petitioners, they produced Capt. Martin as their sole corroborating witness for their defense that *they* were the parties who had been solic-

ited to seek bribes and that *they* were the victims and not the culprits in the extortion conspiracy. The District Attorney savagely attacked Capt. Martin for having refused to testify at the Grand Jury hearing. He insisted that if the witness had told the truth upon the trial, he had lied before the Grand Jury when he said his answers might incriminate him. He assailed the witness as a self-confessed liar and perjurer who had "raised his hand and sworn before his Maker he was going to tell the Grand Jury the truth"; and the district attorney then said Martin had in effect claimed that if he testified truthfully before the Grand Jury he would incriminate himself; while at the trial, Capt. Martin, likewise, swore to tell the truth yet testified in such a such a manner that his testimony in no way incriminated him. The district attorney's questions to Capt. Martin and his arguments to the jury are contained in Appendix C.

The trial court and the district attorney relied on the case of People vs. Kynette, 15 Cal. 2d 731, 104 P. 2d 794, as authority for its holding that the witness at the trial could be impeached by evidence that he had refused to testify before the Grand Jury on the ground of self incrimination. The fact that the Kynette case had been overruled by *People vs. Calhoun*, 50 Cal. 2d 137 323 P. 2d 427, and *People vs. Snyder*, 50 Cal. 2d 190, 324 P. 2d 1, was overlooked by the trial court. The California District Court of Appeal in the instant case refused to consider or rule on this point upon the ground that petitioners were not prejudiced because prior to Capt. Martin's taking the stand and testifying at petitioners' trial, petitioners had been questioned on cross-examination without objection, as to their knowledge that Capt. Martin refused to testify before the

Grand Jury. (The questions to and answers of petitioners are contained in the opinion of the District Court, appendix A).

Reasons for Granting Writ

The fact that in Federal proceedings the Fifth Amendment prohibits the impeachment of a witness upon the ground of his claim of the privilege against self-incrimination is fully settled and recognized. *Grunewald v. United States*, 353 U.S. 391, 415-424, 425, 426, 77 L. Ed. 2d 931; *United States v. Tomailo*, 249 F. 2d 683, 690-692, 696.

This principle was reiterated in the recent case of *United States v. Sobel*, 314 F. 2d 314, wherein the Court asserted at page 320, ". . .(I)mproper use of a witness' claim of Fifth Amendment privilege before the grand jury to impeach him at the trial can constitute a ground for reversing the conviction of the party for whom he testified. . ."

Petitioners, initially, seek to invoke the application of the Fifth and Fourteenth Amendments in respect to state proceedings to protect a person from being compelled to act as a witness against himself.

Petitioners realize that Chief Justice John Marshall announced in 1833 that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were security against the general government and not state governments, and that the provisions of the Fifth Amendment that private property should not be taken for public use without just compensation, was solely a limitation on the power of the United States. *Barron v. Baltimore*, 7 Peters 243, 8 L.Ed. 672.

Latterly, however, there has been a reversal of the

view that the Bill of Rights does not apply to the States.

Thus, this Court held in *Chicago B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 241, 17 S.Ct. 581, 41 L.Ed. 979, that the provision of the Fifth Amendment that private property should not be taken for public use without just compensation was applicable to the States. This case, likewise, held that the last clause of the Seventh Amendment applied to cases tried before a jury in a state court and brought before the Supreme Court by writ of error.

The various clauses of the First Amendment have been held to be of an immutable and fundamental nature and immune from state invasion. These include the Establishment and Free Exercise clauses, (*Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed. 2d 965; Freedom of Speech and Press, (*Gitlow v. New York*, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138); Assembly, (*DeJonge v. Oregon*, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278); Petition for Redress of Grievances, (*Edwards v. South Carolina*, 372 U.S. 229, 83 S.Ct. 680). All these rights have been held to be immune to invasion by the states even though by its very terms the First Amendment is specifically addressed to *Congress*.

In the case of *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 1081, decided June 19, 1961, it was held that the Fourth Amendment's grant of the right of privacy and security against unreasonable search and seizure was enforceable against the states, through the due process clause of the Fourteenth Amendment and it is as enforceable against them as against the Federal Government. (367 U.S. at p. 655)

It was held in *Kohlfun v. Warden Connecticut State Prison*, 183 A. 2d 620, that the Fifth's ban on double jeopardy is applicable to state matters.

The dictate of the Sixth Amendment that in all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defense was held applicable to state trials in *Powell v. State of Alabama*, 287 U.S. 45, 68-9, 53 S.Ct. 55, 77 L.Ed. 158.

In keeping with this Court's decisions, it has likewise been held that the due process clause of the Fourteenth Amendment makes the Eighth's ban on Cruel and Unusual Punishments applicable to State proceedings. *Robinson v. California*, 370 U.S. 660, 666, 82 S.Ct. 1417, 1420, 8 L.Ed. 2d 758.

In view of this Court's recent ruling that the Fourth Amendment is applicable to the States, together with the other holdings of this Court that the provisions of the First, Sixth, Eighth Amendments and at least a part of the Fifth and Seventh Amendments are likewise binding upon the States and enforceable against them, it is respectfully urged that this Court should re-examine its avowed traditional position that the privilege against self-incrimination is not within the compass of the protection of the Fifth Amendement.

To hold on the one hand that the Fifth Amendment's prohibition against the taking of private property is applicable to the several states by virtue of the operation of the Fourteenth Amendment, but that the more important fundamental personal privilege against testimonial compulsion guaranteed by the same Fifth Amendment is not protected from encroachment by

the states, is to draw a distinction which appears unsupported by logic.

As this court pointed out in *Mapp v. Ohio*, supra, this court in *Boyd v. United States* (1886) 116 U.S. 616, 6 S.Ct. 524, 532, 29 L.Ed. 746, considering the Fourth and Fifth Amendments as running "almost into each other," declared "it is the invasion of his indefeasible right of personal security, liberty and private property . . . Any forcible and compulsory extortion of a man's own testimony or his private papers to be used in evidence to convict him of crime or to forfeit his goods, is within the condemnation . . . (of those amendments)."

This Court has now recognized that the prohibition against unreasonable searches and seizures of the Fourth Amendment should, and does, apply to State proceedings, as declared in *Mapp v. Ohio*, supra. The philosophy, reasoning and authority of Mr. Justice Black, as expressed in his vigorous dissent in *Adamson v. California*, 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903, wherein he pointed out that the Fourteenth Amendment was specifically enacted "to make the Bill of Rights applicable to the states," should be adopted to declare that the provisions against self-incrimination contained in the Fifth Amendment should apply with equal force to the states. Both of these provisions are so similar in scope and purpose that there is no valid reason for delaying such a pronouncement. The Fifth Amendment's protection against self-incrimination is such an expression of fundamental liberty as to have been brought within the Fourteenth Amendment by a process of absorption. (302 U.S. at p. 326, 58 S.Ct. at p. 152, 82 L.Ed. 288)

There should be no double standard of rectitude and justice applied to a state prosecutor and a federal attorney. One should not be allowed to compel a witness to testify or incriminate himself while the other is forbidden to do so. (*Mapp v. Ohio*, supra, at p. 657).

The fact that Capt. Martin had refused to testify before the Grand Jury was incompetent, irrelevant and immaterial upon petitioners' trial. The introduction of this evidence and the prosecutor's use of it deprived petitioners of a fair trial and due process of law.

A witness' claim of the privilege against self-incrimination before a grand jury is not inconsistent with the witness' later testifying at the trial. It is quite consistent with innocence for a person to refuse to testify against himself before a grand jury and later to testify at a trial.

The plea of the Fifth Amendment is not relevant to credibility, and it cannot be used to impeach a witness. *Grunewald v. United States*, supra; *Halperin v. United States*, 353 U.S. 391, 423, 427, 77 S.Ct. 963, 1 L.Ed. 2d 931.

As was held in *United States v. Tomailo*, supra:

"Insofar as guilt or innocence is concerned, it is clear that claiming the privilege does not employ any guilt which would be at all inconsistent with later protestations or indications of innocence. . .

"Where a witness has a reasonable belief that he may be a defendant himself — it is perfectly consistent with innocence and with nonincriminatory answers to refuse to testify at all."

A refusal to testify is inadmissible as an admission

made by a party in response to accusatory statements or to show a consciousness of guilt. No implication of guilt can be drawn from a party's reliance on constitutional and statutory guarantees against self-incrimination. *People v. Snyder*, 50 Cal. 2d 190, 324 P. 2d 1.

Refusal to testify before a grand jury is neither an admission to an accusatory statement or a showing of consciousness of guilt. *People v. Calhoun*, 323 P. 2d 427; *People v. Talle*, 111 Cal. App. 2d 650, 663, 245 P. 2d 633.

The evidence and arguments were erroneously admitted, and the evidence and arguments thus admitted were highly prejudicial. Because the evidence was inadmissible under any view of the rules of evidence, including that of the State of California, petitioners were deprived of their right to a fair trial in violation of the due process clause of the Fourteenth Amendment.

No presumption is created against a person who declines to testify against himself in accordance with his constitutional right under the Fifth Amendment, and neither his character or reputation for truth and veracity can be attacked for such refusal. *United States v. Walker*, 313 F. 2d 236.

The test of relevancy and materiality is this — is the evidence which is sought to be introduced logically probative of any issue in the trial. The only basis upon which Martin's claim of the privilege could be used to impeach him was on the theory that this claim of privilege was inconsistent with the later testimony showing his innocence.

It is true some cases have held that mere error in the admission of evidence or the exclusion of evidence is not so grievous as to rise to the dignity of being an affront to the due process clause. In this case, however, petitioners contend that the court's error in admitting the impeaching evidence, and the vehement argument of the prosecutor based thereon, completely and quite improperly destroyed defendants' claim that they were working as undercover agents to secure evidence against the real culprits who were the witnesses for the People.

This goes far beyond the question of whether error has been committed; it goes beyond the question of whether prejudicial error has been committed. It extended to the point of depriving petitioners of due process of law. The California Supreme Court has by its refusal to grant a hearing, indicated its opinion that the error was not so prejudicial as to require a reversal.

The United States Supreme Court, however, should not be precluded from conducting its own inquiry into the question of whether the rights of a citizen of the United States have been violated, merely by the fact the highest court of the State has declined to reverse the case on the ground of the errors committed.

"Upon a state there rests no more sacred duty than the protection of the lives of its citizens from criminal attack. At the same time the state owes a duty to any person charged with such crimes to afford him a fair trail as required by the Federal Constitution. What is a fair trial depends upon the circumstances existing at and prior to the trial. An accused's right to a fair trial is coexistent with the

right of law abiding citizens to lawful protection by their government." *Irvin v. Dowd*, 271 F. 2d 552, 554.

This Court has held that the Fourth Amendment, implemented by the self-incrimination clause of the Fifth, forbids the Federal Government to convict a man of crime by using testimony or papers obtained from him by unreasonable searches and seizures as defined in the Fourth Amendment. This Constitutional prohibition has been held enforceable against the states through the Fourteenth Amendment. This Court will grant certiorari to review a state court judgment which is based upon inadmissible evidence. *Ker v. State of Calif.*, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed. 2d 726.

This Court has on a number of occasions held that a coerced confession is violative of the due process clause of the Fourteenth Amendment. *Haynes v. State of Washington*, 372 U.S. 503, 83 S.Ct. 1336, 10 L.Ed. 2d 513; *Lynumm v. Illinois*, 372 U.S. 528, 83 S.Ct. 917, 9 L.Ed. 2d 922. By analogy, it is urged that compelling a witness to testify under the penalty of later being called a perjurer or being impeached for claiming the privilege against self-incrimination constitutes coercion within the meaning of the Fourteenth Amendment.

In *Ker v. State of Calif.*, supra, at p. 1628, it was stated that the self-incrimination clause of the Fifth Amendment implements the provisions of the Fourth Amendment forbidding unreasonable searches and seizures and that these Constitutional prohibitions are enforceable against the state through the Fourteenth Amendment.

Haynes v. State of Washington, supra, held the improper reception into evidence of a confession that was obtained by coercive measures, was a violation of the Fourteenth Amendment and deprived the defendant of a fair trail. Improper reception of evidence is the ground upon which petitioners based their grievance herein.

In *Rideau v. State of Louisiana*, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed. 2d 663, it was declared that the broadcast of a television interview with the defendant in which he admitted perpetrating a bank robbery, kidnapping and murder was a subtle but real deprivation of due process of law and warranted a reversal of defendant's conviction.

United States v. Maloney, 262 F. 2d 535, is a case that is pertinent herein. That case was likewise a prosecution for conspiracy to blackmail a doctor for performing illegal abortions. Witnesses were called by the prosecution and asked questions which the prosecutor knew in advance that the witnesses would refuse to answer on the ground of self-incrimination. In its summation, the prosecution referred to the refusals in a context that could only have been understood as arguing that, if the witnesses had not refused, their answers would have been in the affirmative.

> The court declared, "when a witness claims his privilege a natural, indeed an almost inevitable inference arises as to what would have been his answer if he had not refused — such refusals have been uniformly held not to be a permissible basis for inferring what would have been the answer, although logically they are very persuasive (page 536 to 537). Admonitions to the jury not to use the re-

fusal to testify as evidence of what the answer would have been are as likely to prejudice the interest of the accused as to help them, imposing, as they do, upon the jury a task beyond their powers: i.e. a bit of 'mental gymnastics' as Wigmore Section 2272 calls it, which it is for practical purposes absurd to expect of them." (538)

In the instant case, the prosecutor knew that Capt. Martin had refused to testify before the grand jury, and he mounted a vitriolic attack against Martin in his summation to the jury based upon the claim of this privilege.

It has been held on a number of occasions that the suppression of evidence favorable to the accused is itself sufficient to amount to a denial of due process. *Brady v. State of Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215; *United States v. Baldi*, 195 F. 2d 815; *United States v. Dye*, 221 F. 2d 763, 9 L.Ed. 2d 770.

In *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, defendant allegedly made a confession after he had been given an injection of hyoscine. The identity of hyoscine and scopolamine was established. The doctor who had administered the hyoscine testified for the People as to the effect of hyoscine. Petitioner's expert was a highly qualified doctor of physiology, pharmacology and toxicology. He testified as to the effect of the injection of hyoscine upon a hypothetical subject obviously, the petitioner. Because no one testified that scopolamine, also known as hyoscine, is commonly known as "truth serum," this Court determined that petitioner had been denied a fair trial. This, although

it was not claimed that either side had asked the question whether or not scopolamine or hyoscine was also known as truth serum, and it was not claimed that there had been a willful suppression of such a fact.

If the mere omission to introduce evidence which no one has solicited can constitute deprivation of a fair trial and a violation of the Fourteenth Amendment, how much more does the interjection of irrelevant and inflammatory evidence constitute a denial of a fair trial and a denial of due process.

As this Court said in *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, at 795; 9 L.Ed. 2d 799 "a provision of the Bill of Rights which is fundamental and essential to a fair trial" is made obligatory upon the states by the Fourteenth Amendment. Surely the right against self-incrimination and the introduction and reception of proper evidence are both fundamental and essential to a fair trial.

The rising tide of decisions of this Court toward a recognition that the first ten amendments to the Constitution of the United States are applicable to state courts, and that the Fourteenth Amendment was specifically adopted to make the Bill of Rights applicable to state proceedings has achieved such a flood as to require this Court to directly hold that the self-incriminatory prohibition in the Fifth Amendment should apply to state proceedings. To hold otherwise, is to hold that the states may invade the rights of citizens, deprive them of due process of law and the right to a fair and impartial trial in the very circumstances that the sovereign government is forbidden to do.

Conclusion

In conclusion, upon the facts and law, it is respectfully urged that this Court grant this petition otherwise petitioners herein will be deprived of their Constitutional Rights to a fair and impartial trial as provided by the Fourteenth Amendment, as supplemented by the Fifth Amendment, to the Constitution of the United States of America.

Respectfully submitted,

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APPENDIX A

In the District Court of Appeal

State of California

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

vs.

HARRY FINCH and JAMES THIELE,

Defendants and Appellants.

Crim. No. 7865
Dist. Court of Appeal - Second Dist.

FILED

MAY 21, 1963
ALLEY, *Clerk*

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Deputy Clerk

Appeals from orders and judgments of the Superior Court of Los Angeles County. J. Howard Ziemann, Judge. Judgments affirmed as to Count X and are reversed insofar as they impose punishment for the offenses of solicitation under Counts V to IX, inclusive.

For Appellants: Ramsey & Emlein.

For Respondent: Stanley Mosk, Attorney General; Norman H. Sokolow, Deputy Attorney General.

By indictment James Thiele, a Long Beach Police officer, was accused in count I of having accepted a bribe of $3,000 in 1957. In counts III, VI, VII, VIII, and IX, both Thiele and Harry Finch, who was also a police officer of Long Beach, were accused of soliciting one Henry, also a police officer, to accept and join in the acceptance of a bribe and join in the commission of extortion; in counts IV and V, both defendants were accused of soliciting one Jordan, another police officer, to accept and join in the acceptance of a bribe and join in the commission of extortion. In count X, they were accused of conspiracy to ask for and receive and agree to receive bribes and extort money from one Garland and to solicit Jordan and Henry to ask for, receive and agree to receive bribes and extort money from Garland.

In a jury trial Thiele was acquitted upon count I, both defendants were acquitted upon counts II, III and IV and both were convicted upon counts V to X, inclusive. Their motions for a new trial were denied and both defendants appeal from the judgment and the order denying their motion.

The grounds of appeal are (1) it was error to develop in the cross-examination of a witness for the defense that he had refused to testify before the Grand Jury upon the ground of self-incrimination; (2) the jurors were coerced into returning verdicts by being retained in session into the ninth day; (3) error was committed in the use of recordings and transcripts of recordings of conversations with the defendants; (4)

a memorandum prepared by police officers (Exhibit 6) was improperly received in evidence; and (5) defendants were twice punished for the same acts.

It is not contended there was insufficient evidence to justify the verdicts. Defendants' attorneys properly recognize that there was sufficient evidence that defendants solicited Jordan or Henry to commit the crimes charged, at the times stated in the several counts of the indictment.

Although the issues were comparatively simple the record on appeal consists of more than 5,000 pages of testimony and the briefs are voluminous.

The active participants in the events which led to the prosecution were detective inspectors Finch and Thiele, patrolmen Jordan and Henry, and the intended victim of the proposed extortion, Dr. Garland, a colored physician practicing in Long Beach. Detective Captain Martin and Lieutenant Black were kept informed of some of the activities of the principals. The following summary of the evidence will suffice for disposition of the points on appeal.

Dr. Garland was accused of abortion in 1957, but upon his trial was acquitted. Count I of the present prosecution charged that, in connection with the prosecution of Dr. Garland, Thiele received from Garland a bribe of $3,000.

A substantial portion of the evidence related to Count I on which Thiele was acquitted. As to the other counts the activities of Finch and Thiele, Jordan and Henry, as developed by the evidence of the People, commenced in February 1960, and were to continue until early September. Several amounts of money were given by Dr. Garland to Jordan and Henry. He was

told that Jordan had been sent to him by Finch and Thiele to represent that they (Finch and Thiele), unless bought off, would accuse Garland of the commission of abortions. He understood that Jordan and Henry were laying a foundation for charges against Finch and Thiele and agreed to cooperate with them.

According to the evidence of the People, defendants first solicited commission of the offenses by Jordan and Henry in the early part of February 1960. They proposed that Jordan represent to Garland that they, Finch and Thiele, would instigate prosecution of Garland for abortion unless they were paid $400 per month. It was understood that the four officers would participate, and as the money was received, it was divided into five equal shares, one share each to Jordan, Henry, Finch and Thiele, and one share, supposedly, to Captain Martin, the superior of Finch and Thiele. Jordan and Henry reported the situation to Lieutenant Black and thereafter acted under his instructions and those of other officers.

February 8, 1960, Garland gave Jordan $400, which he gave to Thiele. Of this sum $150 was given to Jordan as the shares of himself and Henry and was returned to Garland. About April 20th Garland gave Jordan $250 which he gave to Thiele. Jordan was given $50 by Thiele and Henry received $50 from Finch. June 6th, Garland was provided with $150 by deputy Landry of the sheriff's office, and Garland gave this money to Thiele who gave $30 to Jordan and $30 to Henry. June 13th, Henry received $150 from Landry, gave it to Finch and received from the latter $30 for himself and $30 for Jordan. About July 11th deputy sheriff Landry provided Henry with $400. The money

was given to Thiele, who gave Jordan and Henry each $80. July 27th, Landry provided Henry with $200. Henry met Finch and gave him the money, but at the direction of Finch took $80 as his and Jordan's shares. This sum was returned to Landry. September 2nd, Landry gave Henry $550. Henry told Finch he had received $600 from Garland and had it in his car. Finch sent Thiele with Henry to the car, where Thiele received $550 and told Henry to get another $50 from the doctor. Thiele gave Henry $220, whereupon Lieutenant Black and other officers appeared, placed Thiele under arrest and found $330 of marked bills in his pocket. $540 in some forty small bills had been in the possession of Finch, assertedly as evidence, but at the suggestion of Captain Martin, these had been exchanged for larger bills. When Finch was arrested, he was carrying $1,414; Thiele was carrying $550, of which $400 was in $100 bills folded up and tucked into his "badge case."

It will simplify matters somewhat to point out that the events which took place between February 8th and September 2nd should be considered as divided into two phases, one, those occurrences between February and April 26th, and the other, between the latter date and September 2nd. Counts II, III, and IV, which involved both defendants, charged offenses committed February 8th, March 10th and April 18th. The defendants denied that they had solicited Jordan or Henry to contact Dr. Garland for any purpose and they denied having received any money from Dr. Garland or Jordan or Henry prior to April 26th, when Henry gave Finch $30, which, according to Finch, was returned to Henry. Their explanation of their activities from that time on

was that Henry admitted to them that he and Jordan had been taking money from Dr. Garland, proposed that Finch and Thiele join with them in obtaining up to $400 per month from Garland; they (Finch and Thiele) took the matter under advisement, talked with Jordan, who also invited them to join in extorting bribe money from Garland, and they agreed, with the approval of Captain Martin, to go along in the scheme, but only for the purpose of entrapping Jordan and Henry. They admitted their participation in the activities which were the basis of counts V, VI, VII, VIII and IX. They testified that all the sums they received were shown to Captain Martin, and that they acted at all times under his direction.

There was no material conflict in the evidence as to the actions of the four officers after April 26th. All the jury had to decide as to the several counts was which pair was acting with criminal intent and which pair with the purpose and expectation of fastening the crimes upon the other. The distinguishing feature of the execution of the plan was that Jordan and Henry made known their actions and purpose to Lieutenant Black, who, with Chief Mooney, enlisted the cooperation of members of the sheriff's force and the district attorney's office, whereas the activities of Finch and Thiele, were made known only to Captain Martin.

The Grand Jury undertook an investigation of the activities of Finch and Thiele. Captain Martin was requested to appear in the investigation. He was not served with a subpoena, nor was that process customarily used to obtain the presence of peace officers. Martin appeared, was called as a witness and refused to testify upon the ground of self-incrimination and

upon the advice of his attorney. Upon the trial he testified at length, explaining that he participated and cooperated with the defendants and directed their activities for the purpose of laying a foundation for the apprehension of Jordan and Henry, upon the representation of defendants that Jordan and Henry were extorting money from Dr. Garland. Martin was questioned by defense counsel whether he had not refused to answer numerous questions before the Grand jury upon the ground of self-incrimination.[1] Martin answered that he had refused to testify on the ground of self-incrimination and upon the advice of his attorney. It is strongly urged that the ruling was grievous error.

It appears that the court considered the fact of Martin's refusal to testify before the Grand Jury on the ground of self-incrimination to be admissible for the purpose of impeachment. The court relied upon *People v. Kynette*, 15 Cal. 2d 731 and *People v. Wayne*, 41 Cal. 2d 814, as authority for the admission of the evidence of Martin for impeachment purposes. Defendants urge that the holding in *Kynette* and *Wayne* that the refusal of a witness to testify upon a former occasion upon the ground of self-incrimination is admissible as impeaching evidence was overruled in *People* v. *Calhoun*, 50 Cal. 2d 137 and *People* v. *Snyder*, 50 Cal. 2d 190. The People reply that the latter cases held only that evidence of a former refusal to testify is

1. In chambers it was disclosed that the district attorney proposed to ask Martin on Cross examination whether he had not refused to testify before the Grand Jury upon the ground of self-incrimination. Defendants interposed an objection to the proposed questioning and their objection was overruled. Counsel then announced, that in view of the court's ruling they would question Martin on the subject. We, therefore, treat the evidence as if it had been elicited upon cross-examination.

inadmissible and not to be considered as indicating a consciousness of guilt or as a basis for a finding of guilt, and that it was error to permit its consideration for those purposes. It is unnecessary for us to consider this point. Even if it was error to permit the questioned cross-examination of Martin defendants suffered no prejudice therefrom. Before Martin was examined Thiele was asked on cross-examination: "Q: As a matter of fact, you know he [Martin] appeared before the Grand Jury and refused to testify, don't you?" and he answered: "I do know that, yes, sir." Finch was questioned on cross-examination as follows: "Did you ask him what he had said before the Grand Jury? A: He told me why he didn't testify. Q: He told you that he had refused to testify on the ground of self-incrimination, didn't he? A: No, he didn't. Q: Now, at some time you did learn that it was a fact though, didn't you? A: Yes." There was no objection to this interrogation.

By this testimony the jury was unequivocally made acquainted with the fact that Martin had refused to testify before the Grand Jury upon the ground of self-incrimination, and the only fact that was added in the examination of Martin was that in refusing to testify he was acting upon the advice of his attorney. If any prejudice resulted it was from the testimony of the defendants, to which no objection was made. The claim of prejudice cannot be sustained.

The next point is that the deliberations of the jury were extended into the ninth day and that they were thereby coerced into arriving at verdicts which otherwise might not have been reached. During the deliberations two jurors became ill and were examined by

physicians. One of them was taken into the judge's chambers and was removed separately to the Alexandria Hotel where the jurors were staying. She was attended by a physician whose office was in the hotel and was found to be only slightly indisposed. The other jurors were returned to the hotel. All this occurred after 4:15 p.m. The juror was at all times in custody of the bailiff or a female deputy sheriff and no mention was made of the case on trial.

These facts do not sustain the claim that the jury was coerced into returning the verdicts. As previously stated, a great deal of the evidence in the case related to the charge of bribery in count I, and the details of the activities of the defendants and other participants were related by some thirty witnesses. The fact that defendants were acquitted upon four counts of the indictment clearly indicates that the jurors scrutinized carefully the evidence relating to each of the offenses charged. No complaint came from them that their confinement was causing them discomfort. The indisposition of two of the jurors was of slight significance. The court at no time endeavored to hasten the deliberations. It was not intimated to the court at any time that it was improbable that verdicts would be agreed upon; the court had reason to believe that progress was being made and that the jurors did not consider their retention to be burdensome, or in any manner coercive. Although the jurors were kept in session for an unusual length of time they had an unusual task, since they had ten counts of the indictment and a vast amount of testimony to consider and it is, of course, undeniable that the ends of justice were better served by the consideration that was given deliberately to each separate of-

fense charged than would have been the case if the jurors had acted hastily. There was evidence that would have supported a finding of guilt upon each of the ten counts of the indictment, and there is no more reason to believe that the defendants suffered harm than that they derived benefit from the lengthy deliberations. The defendants made motions for mistrial and for the discharge of the jurors, which were denied. The matter was within the discretion of the court, and we find no error or abuse of discretion in the procedure.

Upon three occasions, June 7th, July 11th and July 26th, a recording device provided by the sheriff's office was carried by Henry or was placed in Jordan's car. Transcripts of these recordings were prepared by a certified shorthand reporter connected with the sheriff's office and these were produced at the trial. The recording of a conversation on June 7th was played to the jury upon motion of the defendants. Those of July 11th and July 26th were played on motion of the People, but over objection of defendants. When one of the records was played the court interrupted for the reason that the projection was unintelligible. This led to the production of copies of the transcriptions for the use of the jurors as they listened to the playing of the records. These were handed to the jurors solely for use during the playing of the records and to aid in their understanding of the same. As soon as the records had been played the transcriptions were taken from the jurors and were not used otherwise, nor again, except upon an occasion when the jurors, during their deliberations, requested the replaying of the records. It appeared from the transcriptions and also from the playing of the records that there were some pass-

ages which were unintelligible. Defendants objected to the playing of the records upon the ground that they were incomplete and that there was insufficient foundation laid for their use. The objections were overruled and error is asserted. Jordan testified that when the recorded conversations were fresh in his mind he had heard the records played, had read the transcriptions, and that as he remembered the conversations, the statements that could be understood in the playing of the recordings, and the transcriptions, were accurate. There was other testimony to the same effect. The court ruled that in the absence of other evidence a sufficient foundation had been laid for the use of the recordings. Later in the case the defendants testified that the recordings were incomplete, which fact was uncontroverted. But nowhere in the record does it appear that there was testimony that any statement heard in the playing of the records was a misstatement of what had been said, nor was there evidence of any material statement that had been made during the conversations which was not recorded and transmitted intelligibly. Many statements that were recorded were of no materiality whatever and these were quite properly omitted in the testimony of the witnesses.

It is also urged that the use by the jurors of the transcriptions was error for the reason that it tended to emphasize and impress on their minds statements of defendants which tended to incriminate them.

The logical way to lay a foundation for the playing of the recordings of the conversations was for a participant in the conversations to listen to the recordings and to state whether, according to his recollection, the conversations were truthfully recorded. This procedure

was followed by the court and we think it was adequate. There can be no doubt that before permitting recordings to be played to the jury the court should satisfy itself that they are substantially complete and substantially correct as to matters that are material and important. It is a matter that must be left to the discretion of the court. The playing of the records was found by the court to be difficult to understand and unsatisfactory. The important thing was that the jurors should be enabled to understand them. The transcriptions had been prepared by an expert and were used for a proper purpose.

It is clear, moreover, that defendants suffered no prejudice through the playing of the records or the use of the transcriptions. In fact, there was little need for using them, although this was not known at the time they were made use of. We have said that the transcriptions were not shown to be false in any particular with respect to the statements that were recorded. This is borne out by the testimony of the defendants. The only portions of the recordings and the transcriptions which tended to inculpate the defendants were of statements to which the defendants, themselves, testified. In the recording of the June 7th conversation, which took place while Jordan and Dr. Garland were seated in Jordan's car and Thiele was engaging them in conversation, Dr. Garland was explaining to Thiele that he had not been making any money; Thiele stated that as long as he was not making any money he would not be bothered, but that if he got to making money and did not report it to Thiele that he (Thiele) would be very unhappy about it. Garland said that he had only $150, that he would give it to Thiele and more later.

but Thiele told him to "hang on to it." Jordan said "How about the $400 deal with Garland" and Thiele said that that could be worked out when Garland got back to work and started doing something, but he admonished Garland not to get caught. Thiele not only testified to substantially the same facts, but he also testified that at the June 7th meeting he and Jordan walked away from the car, Jordan said he needed the money, Thiele told Garland to give Jordan the money, which Garland did, and Jordan gave it to Thiele; that he returned $30 of it to Jordan and gave $30 to Finch the following day.

The July 11th recording was of a conversation between Henry, Jordan and Thiele, which took place in a police car in front of the home of a friend of Thiele's. Someone asked "Is it all there?" and Henry answered "400 there." Thiele asked "going to split it five ways, aren't we?" and Henry said "Right, five ways—just like usual, We got to cut Captain Martin in, got to cut Harry in." Thiele gave Jordan "five" (apparently $20 bills), but took back one. There was also some discussion of "the old man" (evidently Garland). Thiele testified to the receipt of $400 upon that occasion and to having given $80 to Jordan and $80 to Henry.

Although the recordings clearly disclosed that the participants were dividing money that had been received from Garland, that fact was freely admitted by the four officers, with the explanation by each pair of participants that they were acting solely to entrap the other, in the interests of law enforcement. We find no error or abuse of discretion in the playing of the

records or use of the transcriptions. (See *People* v. *Wojahn*, 159 Cal. App. 2d 135).

Error is assigned in the admission, over defendants' objection, of a three page report prepared by Henry, at the request of Lieutenant Black, recording the development of the Garland affair. Black asked Henry for a report shortly after having been informed of the occurrences on and about February 8th. Henry prepared a report February 16th and gave it to Black on the following day. Black kept the report in confidence until he gave it to Chief Mooney about May 5th. Captain Bowers of the sheriff's office was informed and as a result the report was shown by Mooney to deputy sheriff Brooks.

The portion of the report which related to the demands made upon Dr. Garland by Jordan covered the proposal by defendants to Jordan on February 8th that Garland be told that he would be expected to pay $400 per month for protection. The report covered Jordan's conveying the massage to Garland that Thiele and Finch threatened that if he did not cooperate they would "set him up" for abortion, as they had done before; that Garland agreed to cooperate and try to pay $400 per month; Jordan and Henry informed Lieutenant Black of the foregoing and were instructed to "play along" and keep him advised, and to return to Garland any sums they received from him; February 11th, Garland gave Jordan $400; the money was given to Thiele at the Detective Bureau in the presence of Finch; Thiele went into Captain Martin's office and then Thiele and Finch left the building; February 16th, Thiele gave Jordan $150, which Jordan returned to Garland. It was stated that all these occurrences

were reported to Lieutenant Black. The report also mentioned statements of Garland with respect to his prosecution for abortion in 1957 and payment of a bribe.

In the People's case the Henry report was received for identification and was used in the cross-examination of Henry and Black. It was offered in evidence by the People after the defense was closed, for the limited purpose of meeting any claim that the testimony of Jordan and Henry, which implicated defendants as conspirators in the demands made upon Garland, was a recent fabrication. Over defendants' objection the report was admitted for the limited purpose for which it was offered.

The theory of the defense was that Jordan and Henry had been extorting money from Garland, and that when they became fearful their offenses had been discovered they decided to accuse defendants as the real culprits and to pose, themselves, as feigned accomplices, and thus obtain immunity.

There was evidence of certain additional incidents which had a bearing upon the theory of the defense. Henry testified that about April 26th, in a bar, Finch handed him $50, asking him whether he wanted to make some money, mentioning the Garland matter. Finch's version of the transaction was that he contacted Henry to find out whether he and Jordan were taking money from Garland. He and Thiele got Henry drunk and he admitted to them that he and Jordan had been taking money from Garland, and he gave Finch $50, which Finch promptly returned to him. It was then that Henry and Jordan proposed that Finch and Thiele join with them in making demands upon Gar-

land, and that they decided to go along as ostensible participants. May 5th, Mooney replaced Dovey as chief of police. A few days later Jordan and Henry met with representatives of the sheriff's force, a deputy district attorney and Lieutenant Black. Thereafter, operations were carried on under the direction of these officers.

When Thiele was questioned as to what he believed had led to the charges against himself and Finch he answered that he believed that Jordan and Henry had become fearful that their actions had become known to Black and Mooney, or some other law enforcement agency, and that in order to obtain immunity they conceived the plan to accuse Finch and Thiele as the real offenders, and to represent themselves as only feigned accomplices. Thiele also suggested that Henry's report might have been written in May, at about the time of the conference of the officers, who met on May 7th.

Thiele's statement of his belief that Jordan and Henry, fearing their crimes had been discovered, decided to shift the blame to defendants in order to obtain immunity for themselves, expressed the entire theory of the defense which was, of itself, an accusation that Jordan and Henry engaged in a program of deceit and falsehood which culminated in the testimony they gave at the trial.

The situation was clearly one in which evidence may be received to meet the charge that the testimony given by a witness was a recent fabrication. The rule is stated in *People v. Vera*, 133 Cal. App. 669:

It may be noted that while counsel for defendants assert error in the admission of Exhibit 6 they do not question that the rule was correctly interpreted by the trial court nor do they point out any insufficiency of

facts to justify its application in the present case.

Defendants' final contention is that the judgments subject them to double punishment in violation of section 654 of the Penal Code They maintain that the acts which constituted the substantive offenses are inseparable from and in fact are the same acts which were involved in the crime of conspiracy, and that they cannot be punished for both crimes. The contention is sustainable.

The acts which were alleged as the basis of the substantive offenses charged in counts V to IX, inclusive, were alleged to be overt acts committed pursuant to and to effect the objects of the conspiracy. Each defendant was a principal in each substantive offense by virtue of the unlawful agreement to commit and join in the commission of the same. Although each advised and encouraged the commission of each offense and was a principal under section 31 of the Penal Code, the purpose of this participation was to accomplish the objects of the conspiracy. The series of acts, while separable from each other as to the substantive offenses, were inseparable from the conspiracy itself. *People* v. *Keller*, 212 A.C.A. 208, is decisive of the point. The crimes there charged were conspiracy to commit burglary and attempted burglary. There was but a single purpose, namely, commission of a burglary. The opinion states: "Since the conspiracy was not shown to have any objective apart from that involved in the attempted burglary, the 'one objective' test forbids double punishment. The sentence for the lesser offense (the attempt) must be set aside."

Defendants stand convicted of conspiracy to ask for, agree to receive and receive bribes and to commit ex-

tortion. Under section 182 conspiracy to commit bribery carries the punishment as for bribery under section 68 of the Penal Code of 1 to 14 years. Conspiracy to commit extortion carries the punishment prescribed for extortion (Pen. Code §518) of 1 to 10 years. Solicitation of the commission of each separate crime as charged in counts V to IX, inclusive, carries punishment under section 653f of from 1 to 5 years. Since the punishment prescribed for the offense of conspiracy is in excess of the punishment prescribed for solicitation under each of counts V to IX, inclusive, the sentence imposed under count X, conspiracy, must stand and the sentences imposed under each of counts V to IX, inclusive, must be vacated.

The judgments are affirmed as to count X and are reversed insofar as they impose punishment for the offenses of solicitation under counts V to IX, inclusive.

SHINN, P. J.

We concur.

FORD, J.

FILES, J.

APPENDIX B

"In criminal prosecutions, in any court whatever. . . no person shall be . . . compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law. . ."

Article I, Section 13 Constitution of the State of Calif.

"No person can be compelled, in a criminal action, to be a witness against himself."

Section 688 Penal Code, State of Calif.

"A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself."

Section 1323 Penal Code, State of Calif.

APPENDIX C

The cross examination of Thiele by the District Attorney relative to Captain Martin's failure to testify was as follows:

"Q. Now, was there anything said to Captain Martin about talking to the District Attorney's office about the fact that he had directed you fellows to accumulate this evidence? Did you tell him to do anything to get you out of this difficulty that you were facing?

"A. No, sir.

"Q. Did you ask him to do anything to get you out of this difficulty that you and Finch were facing?

"A. I didn't see what he could do, Mr. Carr.

"Q. He was directing your activities, is that what you testified to?

"A. That's right.

"Q. He could stand up like a man and say, 'I directed them to do this,' couldn't he?

"A. He is a very sick man.

"Q. And so he was sick, but still he could say that, couldn't he?

"A. Yes.

"Q. He could speak, couldn't he?

"A Yes, sir.

"Q. As a matter of fact, you know he appeared before the Grand Jury and refused to testify, don't you?

"A. I do know that, yes, sir.

"Q. Was he sick the day the Grand Jury had him as a witness, as far as you know?

"A. Yes, sir." (Rep. Tr. pp. 3003, line 25, 3005, line 2)

The cross examination of Finch regarding Captain Martin's failure to testify was as follows:

"Q. Captain Martin told you, did he not, that when he appeared before the Grand Jury in your case he had refused to testify on the ground of self-incrimination, isn't that right?

"A. No.

"Q. Did you ask him what he had said before the Grand Jury?

"A. He told me why he didn't testify.

"Q. He told you that he had refused to testify on the ground of self-incrimination, didn't he?

"A. No, he didn't.

"Q. Now, at some time you did learn that it was a fact, though, didn't you?

"A. Yes.

"Q. And you learned that some time about the latter part of September, isn't that right, of 1960?

"A. I am not sure of the date, Mr. Carr." (Rep. Tr., pp 3579, lines 25, 26 and page 3580, lines 1 through 15).

Relying on the court's statement that the door was open for such questioning, defense counsel asked Captain Martin the following questions:

"Q. Did you go to the Grand Jury, sir?

"A. Yes.

"Q. Did you testify before the Grand Jury?

"A. No, I did not.

"Q. Did you refuse to testify?

"A. Yes, I did.

"Q. Before you did that, had you talked with anyone relative to what you should or shouldn't do before the Grand Jury?

"A. I spoke with the two attorneys, and they both advised me that I should decline to testify on the Fifth Amendment, and that, after all, even the fact that Finch and Thiele had already been arraigned on a complaint, the place for me to testify would be in a courtroom, and I felt the same way."

(Rep. Tr. p. 3773, lines 10-24)

Thereafter, the district attorney launched the following attack against Captain Martin on cross examination:

"Q. All right. When you appeared before the Grand Jury, you told the Grand Jury — you will bear with me a moment please, so that we have no mistake in the language.

"Counsel, page 358 of the second volume of the testimony before the Grand Jury.

"Q. You were called as a witness and you were sworn there were you not?

"A. Yes, that's right.

"Q. In fact, the proceedings went as follows:

"'QUESTIONS BY MR. HENDERSON:

"Q. Mr. Martin, it is my duty as a Deputy District Attorney to tell you that if I ask you any question or any of the jurors ask you a question which in your opinion will tend to incriminate you, you need not answer the question. You understand that, don't you?'

He told you that at that time, didn't he?

"A. Yes.

"Q. Insofar as the word 'incriminate,' you know what that means?

"A. Yes.

"Q. That means it would tend to cause you to testify against yourself insofar as the crime is concerned.
Is that your understanding of it?

"A. That's right.

"Q. In reply to this statement of his your answer was:
'A. I do.'
You so answered, did you not? (The witness did not respond):

"Q. All right, wait. I will read it again for you, sir.

"A. Oh, I understand it. That's right.

"Q. You told him that you understood what he told you?

"A. That's right.

"Q. And that was, 'which in your opinion will tend

to incriminate you, you need not answer the question?'

"A. Yes.

"Q. He told you that and you told him that you so understood that?

"A. Yes.

"Q. And you did understand that?

"A. I did.

"Q. The next question by Mr. Henderson was:

'A: If that situation arises, will you please inform us that you prefer not to answer the question because you belive it would incriminate you. You understand that?'

"And you answered to that:

'Yes, sir. I've talked to an attorney and he has advised me that I should decline to answer for that reason.'

"You stated that, didn't you?

"A. Yes.

"Q. Two of them and they told you not to testify, but to answer as I believe you said, 'To stand on the Fifth'?

"A. What's that?

"Q. That is called 'Standing on the Fifth.'

"A. Yes.

"Q. Or it is referred to sometimes as 'Standing on the Book,' is that right?

"A. Well, I hadn't heard that.

"Q. Now, what you mean by 'Standing on the

Fifth,' what means is standing on the Fifth Amendment of the Constitution of the United States that gives the individual a right to refuse to testify on the ground that it may tend to incriminate him, is that right, is that your understanding?

"A. Yes.

"Q. All right, now, I will ask you whether or not this next question was asked of you: 'Q. May I make this suggestion then, Mr. Martin. May I ask you one or two questions and you just claim your privilege. Will you do that, sir?' "And your answer to that was: 'A. Yes, sir.' "You answered that way?

"A. Yes.

"Q. You recall that?

"A. Yes.

"Q. And the next question is 'Q. You know Dr. Garland?' And your answer that that question is 'A. My attorney has advised me I should decline to answer on the ground that it might tend to incriminate or degrade me.' Do you remember so answering?

"A. Yes.

"Q. That means if you had answered that question as to whether or not you knew Dr. Garland and you had answered that truthfully, that would have tended to incriminate you concerning Dr. Garland or degraded you. You understood your answer to mean that, is that right?

"A. I was acting on the advice of an attorney.

"Q. Sir, you haven't answered my question. If you wish I will have the reporter read it to you.

"A. Yes, I understood what the words meant, yes.

"Q. And that answer that you gave, you meant to convey to the Grand Jury that if you had answered the question as to whether or not you knew Dr. Garland, your answer if truthfully given, would tend to incriminate you or degrade you? Was that the information that you wanted to convey to the Grand Jury, is that right, sir?

"A. No, that is not the information I wanted to convey to the Grand Jury.

"Q. All right. We will go on further. The next question asked of you was: 'Q. And is that your personal wish, sir?' You recall that?

"A. What was that question?

"Q. That was in relation to the last one. I will read them together so there is no doubt in your mind.

"A. I remember.

"Q. So that we understand each other and there is no confusion, the question was: 'You know Dr. Garland?'

'A. My attorney has advised me I should decline to answer on the ground that it might tend to incriminate or degrade me.

'Q. And is that your personal wish, sir?

'A. Yes, sir.'

"A. Yes, sir.

"Q. Now the next question is: 'Q. To your knowledge, has Dr. Garland ever given any money to Officer Jordan or Officer Henry and has any of that money ultimately been given to you?'

"Do you recall that question, sir?

"A. Yes.

"Q. Do you recall your answer to that as follows:

'A. Well, again, as my attorney advised me, I decline to answer on the grounds that it might tend to incriminate or degrade me.

'Q. Is that your personal wish, sir?

'A. Yes, sir.' those were your answers, were they not?

"A. Yes.

"Q. And by those answers you wished to convey to the Grand Jury that you had answered truthfully the question of, 'To your knowledge has Dr. Garland ever given any money to Officer Jordan or Officer Henry and has any of that money ultimately been given to you:' had you answered that question truthfully under oath, that answer would have tended to incriminate and degraded you? Is that what you wanted to convey to the Grand Jury, Sir?

"A. No, it isn't.

"Q. Now I am going to ask you whether or not in the discussion when you appeared before the Grand Jury you knew that they were going to

ask you some questions concerning Finch and Thiele, isn't that right?

"A. Well, I certainly presumed that was what it was.

"Q. All right, I am just trying to determine your state of mind.

"A. Yes.

"Q. You knew, did you not, that some questions might be asked of you as to your possible participation with Finch and Thiele in this alleged offense, or offenses, that the Grand Jury was going to ask you, isn't that right?

"A. I don't think I had that in mind.

"Q. Well, there was some discussion between you and your attorney about that, wasn't there?

"A. About between Finch and Thiele and myself?

"Q. Yes, as to a possible inquiry by the Grand Jury insofar as participation by you with them?

"A. No.

"Q. Now, for the purpose of the record, I am referring to Section 1323.5 of the Penal Code. You knew, did you not, that a person that appears before a Grand Jury or a Court or any board of inquisition or a judge, that if he feels that he is going to be accused or charged with any offense, that he need not state he refuses to answer because of possible self-incrimination, but that he can refuse to answer because he is an incompetent witness. You knew that, didn't you?

"A. No, I didn't know that.

"Q. How long have you been on the Police Department?

"A. I have been there 33 years and I never knew that one.

"Q. Well, it may refresh your recollection if I tell you that this section has been on the books since 1865 and was last amended in 1953. Does that help you?

"A. No.

"Q. You still say you have never heard of it before?

"A. That is part of the Penal Code that I guess I missed.

"Q. Now, going further, when you returned on the 5th of September, is it not a fact you learned before going before the Grand Jury, you learned of the nature of the charges against Finch and Thiele, didn't you?

"A. Yes, I believe I did.

"Q. You learned that it involved bribery and extortion and conspiracy and things like that, is that right?

"A. Whatever the newspaper had, that's where I got it first.

"Q. You also learned, did you not, that the general tenor of these offenses involved Finch and Thiele using Henry and Jordan to get money from Garland, isn't that right?

"A. That was the allegation, yes.
(discussion off the record between counsel)

"Q. Captain Martin, are you getting tired?

"A. No, I am all right.

"Q. Do you want a recess?

"A. No, it is all right.

"Q. We don't want any heroes around here.

"A. I don't intend to be a hero.

(Reporter's Transcript, pp. 3800, line 1 through 3808, line 21)

The following quotation is from the district attorney's opening argument

". . .he appeared on the 6th and 7th, and finally on the 8th of September he appeared before the Grand Jury. Here was another opportunity for him to say "Look, Finch and Thiele are as blameless as new born children. They were acting under my direction," and that Henry and Jordan were the ones. He failed to do that, but rather, as he says, took the "fifth," refused to testify on the grounds of self-incrimination." (Rep. Tr. pp. 4436, line 23 to 4437, line 4)

"Now when he returned, he returned on the 5th, and here is something that is real strange. The 5th of September is Labor Day. He is summoned before the Grand Jury to appear at 1:30 P.M. on the 7th. It says the 7th of September that is when he was subpoenaed. I am not reading from his subpoena, but I am reading from something else.

"What does he do? He sees two lawyers. One is not enough for him. He has to see two lawyers. He talks to these lawyers and these lawyers tell him that when he goes before the Grand Jury to refuse to answer on

the ground that his testimony would tend to incriminate him. Well, you heard his story here on the witness stand. Is that the story that would incriminate Martin, the story that he told on direct examination? Is that the story that would incriminate Martin or that would exonorate him and his friends before the Grand Jury? Remember, and keep in mind, the Grand Jury has not indicted the defendants up to that point. They are hearing evidence to determine whether or not they will return an indictment. Does he tell them that these people are working for him and under his direction? No. All right, he told us here that he knew the meaning of the word "incriminate," and that by making that utterance to the Grand Jury, he intentionally wanted the Grand Jury to understand—not intentionally—but he wanted the Grand Jury to understand that if they truthfully knew what he knew about the matter it would incriminate him or tend to establish his guilt to a crime.

"All right, let's go on with Martin. He testified from the date that he appeared before the Grand Jury until the time he came in here in this court, he never told any person of a law enforcing agency—the Sheriff, whom he well knew, the Under-sheriff, whom he well knew, the Chief of Detectives of the Sheriff's Office, whom he well knew, the District Attorney, whom he well knew, Ted Sten, whom he well knew, Thad Brown of the Los Angeles Police Department, whom he well knew — undoubtedly he knew law enforcing officers better than on a mere acquaintanceship basis — he knew at least 100 of them — and he never said anything to them. He was just holding on to this grim thread of life so that he could tell a judge and jury this story.

"Why, ladies and gentlemen? Why, ladies and gentlemen, is there any greater sanctity in you than there is in the Grand Jury of this county? You people do determine guilt or innocence. The Grand Jury doesn't do that, it just has to return an indictment, or not return an indictment. If they feel from the evidence that the person, who is accused, that the indictment is being sought against, are the wrong people, there is nothing that compels them to return an indictment. They are just as free to exercise their judgment on the evidence and the law as you are. They are just as free to exercise their judgment as you are, and they have the right, just as you do, to have the truth and nothing but the truth, laid before them. (Rep. Tr. pp. 4450, line 1 to 4451 line 9)

"He returns on the 5th, that is Labor Day, the day before he is going to the Grand Jury. Now he went before the Grand Jury, and I believe he indicated in the forenoon about 9:00 o'clock on the 6th. Between the time he returned to Los Angeles, or he returned to Los Angeles and this area on the 5th, and the time he goes before the Grand Jury, he tells us he saw two lawyers.

"Then when he finally appears before the Grand Jury, up to that time he has told no one about this, although he knows many people of high station in law enforcement, both from the police work in the investigator status and in the lawyer status — the prosecutors.

"Outside of these two lawyers he has seen no one and he seeks no advice and he gets up before the Grand Jury — now there are 19 people — I don't know whether all 19 sat throughout this case, the hearing of

it, but I do know, ladies and gentlemen, that an indictment was returned, and therefore by law there had to be at least 12 people who sat through the entire hearing of the evidence, because the law requires that 12 Grand Jurors vote for the return of the indictment.

"So there were at least 12 of these 19. They are people who are as honest as you are. In fact, they had been acting as Grand Jurors of this County from about somewhere about the 1st of January, possibly within a week after the 1st of January, until about the 8th of September, 1960, when Martin appeared before them.

"So undoubtedly there was more known about them generally than there was about the 12 persons plus the 3 alternates that would be chosen on the 30th of January of 1961 and sworn to try the case the first week in February of '61.

"When he appears before the Grand Jury, Martin — a very strange thing occurs — Martin has within him this so-called information that he has given us here about the defendants acting under his direction and supervision to catch two rookie detectives where were setting themselves up in business to organize crime in Long Beach, but in particular, had worked extortion on Dr. Garland.

"Does he tell the Grand Jurors anything about that? No. What does he do, ladies and gentlemen? He raises his right hand and, as he did here, swore before his Maker, that he was going to tell the truth, the whole truth and nothing but the truth, so help him God, and then refused to testify on the ground of self-incrimination.

"From the very first question, which was to the ef-

fect, "Do you know a Dr. Garland," and so on down the line.

"Now, ladies and gentlemen, in connection with the instructions in this case, Judge Ziemann is going to advise you, that a witness may be impeached by showing that at a previous time the witness has made a statement which is inconsistent with his present testimony. In other words, impeachment is an attach upon the credibility of the witness. It is an attach upon his truthfulness.

"Let's try that on for size on Captain Martin.

"It is obvious, ladies and gentlemen, that he has lied either before the Grand Jury or he has lied here.

"When I say "lie," I say that with the full understanding of that, because lying is perjury when done under oath as to a material matter.

"I further say that with the full import of the fact again that the lawyer that stands before a jury and calls a witness a liar, does so with a disadvantage for the simple psychological effect that witnesses, and at least the jury's eyes, that witnesses appear to be at a disadvantage in so far as a lawyer is concerned.

"But when he told the Grand Jury the reason he didn't want to answer the questions was because he felt if he did answer those questions truthfully under oath, he would be incriminating himself, that is, making himself guilty of an offense; then he comes and testifies here in the manner that, if you believe him, indicates that he was perfectly blameless, but was in fact performing his paid duty.

"Now both cannot live together. Both testimonies

are not consistent. It is not anything that there is a gray area — it is black and white, ladies and gentlemen.

"Now the the thought occurs to me: Lawyers do not have the right to tell their clients what to say. I am speaking in reference to Chief Martin. They listen to whatever the story is and advise according to the story. Now it is inconceivable that one lawyer, and much less two lawyers, would listen to this story that Martin has told us here about his two friends, his two co-workers, the two that were working under his direction and supervision — in essence, he got them into this. — I think it inconceivable that two lawyers would listen to that and say to him, "Look, you go before that Grand Jury and raise your hand and commit perjury. You tell that Grand Jury you are not going to tell them anything about this case because it may tend to incriminate you.

"Lawyers seek to protect their clients. They give advice which protects. Would anybody tell Martin, even a non-lawyer, if advised of the position that Martin has told us here, was his true position, wouldn't they tell him, "Get up before the Grand Jury." — and remember, Ladies and gentlemen, the Grand Jury has not as yet returned an indictment against these two defendants — would they tell him, "Get up there and commit perjury," or would they tell him, "You get up in front of the Grand Jury and tell them all of the information that you have about this that you received from Finch and Thiele. You tell them about this money that Finch was keeping. You tell them all about the money, that you told Finch to change into large bills because it was inconvenient to carry a large

wad of money. Tell them about it." The Grand Jury does not have to indict, ladies and gentlemen. There is nobody there twisting their arms and saying, "You indict them." They can refuse to indict them.

"Now, let's go one step further. Martin takes the position he did before the Grand Jury, he tells a story — you have heard it — the first time he has ever told that story to law enforcement, before a judge, before a jury, call it a Grand or Trial Jury, before a Sheriff's officer, before the District Attorney."

(Rep. Tr. pp. 4462, line 5 to 4467, line 26)

The district attorney made the following remarks in his closing argument:

"Now in so far as Martin is concerned — now again I am in a position of what I described one time of fools going in where angels feared to tread.

"Now in Martin we have a picture built up — not only of him, but of all the witnesses, there is a picture in your mind — but of him we have this picture that he was told by Dr. McDougall that he had three months to live — September, October, November. The defendants testified to that and the whole thing was built up and Martin gets on the witness stand and he testifies to that and sobs, and then Mr. Ramsey in closing tells us about the dying declaration and apparently, sincerely, Mr. Ramsey is broken up over the demise in the future of a dear friend of his. Now, I can understand that, but the thing is this: Martin is a witness here in this case. We have to discuss it. You can't just say "Well, the poor man is going to die," or "was told he was going to die; therefore, go aside from that."

"The defense brought him here to testify to something. You have a right to determine that man's veracity. You have a right to determine whether you are going to believe him at all, or how much weight you are going to give to his testimony. He is the same as any other witness. Now, Mr. Ramsey spoke of a "Dying Declaration" and correctly he did tell you the law in that regard, that it isn't necessary that an individual swear to God that what he is telling at a time like that is the truth, because the law assumes that he is not going to meet his Maker with a lie on his lips. So that, what does it mean? It means that that knowledge of the individual, in that individual's mind that he is going to pass away is the same as though he had taken the oath.

"Now, let us go a step further: If the oath of a witness "where he swears to his Maker, what he is going to tell is the truth, the whole truth and nothing but the truth, means nothing to him, do you think the fact that his demise, and in the future some time, means more to him so that at time he can tell the truth and not when he is under oath?

"It seems to me it is six of one and half a dozen of another; if you can't believe him under oath, if he lies under oath, why believe him otherwise? Why not weight his testimony in the balance, in the same balance, and by the same standards?"

(Rep. Tr. pp. 4849, line 16 to 4852, line 6)

"All right, now in so far as Mr. Martin rather former Chief Martin is concerned. Chief Martin appeared before the Grand Jury and with the same solemnity that Mr. Ramsey says his testimony here should be treated with, because it is in the nature of

a dying declaration — there were two things, first there was a dying declaration and that he swore before his Maker to tell the truth here.

"It was with the same solemnity he raised his hand and he swore before his Maker he was going to tell the Grand Jury the truth. Did he tell them the truth?

"Here is an opportunity, ladies and gentlemen, for him to have told the Grand Jury this story that he, the Chief of Detectives had ordered these two men that the Grand Jury was then investigating, as well as the rest of the police department, to gather evidence on a couple of men named Henry and Jordan, because Henry and Jordan were shaking down Dr. Garland.

"All right. How does Mr. Martin approach that? Does he approach it truthfully, or rather, what he says, is that truthful, with this story? I don't think so. He says he told the Grand Jury — and the record so reveals — that 'he refuses to testify on the ground of self-incrimination.'"

"Does he know what that means? Yes.

"The questions put to him there — the first question is by Mr. Henderson, who, incidentally, is the deputy District Attorney assigned as legal advisor to the Grand Jury this year, last year, and I think for about ten years last past.

"Said Mr. Henderson:

> "Mr. Martin, it is my duty as a Deputy District Attorney to tell you that if I ask you any questions, or any of the jurors ask you a question which, in your opinion, will tend to incriminate you, you need not answer the question.
>
> "You understand that, don't you?"

"Martin said "Yes, he was told that."

"Then he was asked:

"In so far as the word incriminate, now, I am asking you this: Do you know what that means?

"A. Yes.

"Q That means that it would cause you to tend to testify against yourself in so far as the crime is concerned. Is that your understanding of it?

"A. That's right."

"All right. Now, the next question:

"If that situation arises will you please inform us that you prefer not to answer the question because you believe it would incriminate you? You understand that?" "And he answered that "Yes, sir.

"So up to that point he understands that if there is any question that would tend to incriminate him, which causes him to believe it would be testifying against himself concerning a crime that he has a right to refuse on that ground.

"He is further informed that if any question is asked of him and he prefers not to answer it because it would tend to incriminate him, that's his right.

"Is that hearing rigged?

"Is Chief Martin being treated unfairly, ladies and gentlemen?

"This is before this "framed," or "frame-up Grand Jury" and this "rigged Grand Jury."

"All right. He not only says he understands that, but he says he talked to an attorney who advised him he should decline to answer for that reason. There is no question in Martin's mind.

"In this same mind is this alleged story about Finch and Thiele acting under his direction to get evidence against Henry and Jordan and that the evidence is already accumulated, because on the 2nd of September Finch and Thiele were going to haul Henry and Jordan in before Martin for disciplinary action and probably criminal action, so they say.

"All right. We go on. He refers to that procedure, standing on the Fifth, and he says that he understands that standing on the Fifth means that it gives an individual a right to refuse to testify on the ground it may tend to incriminate him.

"All right. Now, we go on to the next.

"The next question that is asked him:

"Do you know Dr. Garland?"

"Do you know Dr. Garland?"

"I ask you, ladies and gentlemen "Do you know Dr. Garland?" Yes, here on the witness stand; you would say "yes, I known him. He is a witness. He testified."

"Does Martin know Dr. Garland? Yeah, he knew him. He told Mooney some, oh, less than a week before that all he knew about Dr. Garland was that Dr. Garland had been charted with abortion and that he was acquitted. Do you remember I read that to you before?

"He is asked the question before the Grand Jury "Do you know Dr. Garland?"

"His Answer:

"My attorney has advised me I should decline to answer on the ground it might tend to incriminate or degrade me."

"Now, number one, how is knowing Dr. Garland going to incriminate him?

"He knows he told Mooney, and Kortz that he knew him as a defendant, that the Long Beach Police Department had arrested and prosecuted and caused to be prosecuted and subsequently acquitted him on the charge of abortion. But that is going to incriminate him.

"Here he says he knows Dr. Garland because Dr. Garland is the individual whom Henry and Jordan were shaking down, according to Thiele and Finch. Is this a dying declaration? Is this before the Grand Jury an attempt on the part of Martin to meet his Maker without a lie on his lips and tongue?

"Is this Martin, the great benefactor, who has it within his power and knowledge to secure the release of these defendants by telling that story, if believed?

"All right. Now, it's put cold turkey to him before the Grand Jury.

"To your knowledge has Dr. Garland ever given any money to Officer Jordan or Officer Henry, and has any of that money ultimately been given to you?"

"Well, again:

"As my attorney advised me, I decline to answer on the grounds it might tend to incriminate me or degrade me."

"There was a degradation, ladies and gentlemen, but it degradation he was pointing to; it was his own degradation before the Grand Jury investigating corruption in the Long Beach Police Department, he, who boastfully spent 33 years on this department, the better part of his adult life, he, whose interest it should be, if he is acting honestly, to see that corruption that allegedly existed under his regime should be stamped out and thoroughly aired, refuses to answer on the ground of self incrimination.

"You know, Mr. Ramsey referred to the New Testament, in describing Martin and these defendants.

"The New Testament I am unacquainted with as a faith. Mine is within the Old Testament. However, I have read the New Testament.

"I see nothing of Martin that reminds me of Simon Peter. I see nothing about these defendants as Christ-like.

"I do have in mind one of the Ten Commandments, "Thou shalt not bear false witness."

"And if I was given to understand correctly, the Old Testament is as much a part of the faith that Christ started, as the New Testament."

(Rep. Tr. pp. 4873, line 24 to 4874, line 16 and pp. 4875, line 1 to 4880 line 13)

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IN THE

Supreme Court of the United States

October Term, 1963
No. 553

HARRY FINCH and JAMES THIELE,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Petition for Writ of Certiorari.

RESPONDENT'S OPPOSING BRIEF.

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IN THE

Supreme Court of the United States

October Term, 1963

No. 553

HARRY FINCH and JAMES THIEEF,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

RESPONDENT'S OPPOSING BRIEF.

Opinion Below.

On May 21, 1963, the California District Court of Appeal, Second Appellate District, Division Three, rendered its opinion unanimously affirming petitioners' conviction in the Superior Court of Los Angeles County of conspiracy to ask for and receive and agree to receive bribes and extort money, and to solicit such activity. The opinion is reported in 210 A. C. A. 495; 30 Cal. Rptr. 901. The California Supreme Court denied a hearing in the case July 17, 1963. None of the Justices voted in favor of a hearing. (60 A. C. No. 2, Minutes.)

Jurisdictional Statement.

The jurisdictional ground is set forth in the Petition (p. 2): *i.e.*, 28 U. S. C. §1257(3).

Constitutional and Statutory Provisions Involved.

The state constitutional provision and statutes involved are set forth in the Petition (p. 3), *i.e.*, California Constitution, Article I, §13, and California Penal Code, §§688 and 1323. Pertinent portions of these are set forth in Appendix B of the Petition. The federal constitutional provisions involved are the Fifth Amendment to the United States Constitution ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . .") and the Fourteenth Amendment (". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .") (Pet., p. 2.)

Questions Presented.

The questions presented by petitioners are, essentially, whether they were denied due process because the Deputy District Attorney was permitted to question a defense witness who was not himself a defendant and to comment by way of impeachment relative to the witness's claim of the privilege against self-incrimination before the Grand Jury, and whether the privilege against self-incrimination in the Fifth Amendment to the United States Constitution should apply to the state courts. Respondent submits that a further question arises: whether the judgment may be sustained on a non-federal ground.

Statement of the Case.

For a factual statement of the case, respondent incorporates by reference matter appearing in *People v. Finch*, *supra*, 216 A. C. A. 495, 498-501, 502, 504-506, 30 Cal. Rptr. 901, 903-905, 906, 907-909. In short, the evidence discloses that petitioners, who were detective inspectors for the Long Beach Police Department, sought to enlist two patrolmen, Jordan and Henry, in "shaking down" Dr. Garland under the threat of arresting him for abortion. The doctor was to pay $400 a month to be split five ways among the four officers and Captain Martin, the superior of petitioners. Jordan and Henry reported the matter to Lieutenant Black. At Black's instructions, and those of other officers, Jordan and Henry pretended to "play along" with petitioners, to obtain evidence. Jordan and Henry also took Dr. Garland into their confidence and he too "played along." A number of transactions ensued involving the ostensible payment by Dr. Garland of bribes. The new chief of police was advised of the situation and he and Lieutenant Black secured the cooperation of members of the Sheriff's force and District Attorney's Office. Incriminating evidence was obtained through the help of the Sheriff's force and in due course petitioners were arrested. They did not deny various of the matters in question, but claimed that the bribe-solicitors were in reality Jordan and Henry, and that they, petitioners, were "playing along" to get evidence. According to petitioners, they apprised Captain Martin of the matter and "played along" at his in-

structions. Captain Martin, however, did not carry the matter further; he did not contact higher authority.

After petitioners' arrest, the Grand Jury undertook an investigation of their activities. Captain Martin was summoned to appear in connection with that investigation. He did appear, and was called as a witness. He declined to testify on the ground of self-incrimination and the advice of his attorney. At the trial, however, he testified extensively as a defense witness, placing his and petitioners' activities in an innocent light. He was not named as a defendant in the proceedings. Captain Martin acknowledged that he responded to various questions put to him at the Grand Jury hearing by stating that his attorney had advised him he should decline to answer on the ground it might tend to incriminate or degrade him, and that this was his personal wish. Yet Captain Martin stated at the trial, that by those answers (to the effect that he declined to answer on the ground it might tend to incriminate or degrade him) he did not mean to convey to the Grand Jury that his answers if truthfully given would have tended to incriminate or degrade him! [Pet. App. C, pp. 6c-8c; Rep. Tr. pp. 3800-3806.]

As before noted, petitioners' conviction of conspiracy to ask for and receive and agree to receive bribes and extort money, and to solicit such activity, was affirmed on appeal. They complain essentially of the permission extended the People to examine Captain Martin at the trial relative to his refusal to testify before the Grand

Jury, and they also complain of the Deputy District Attorney's comments on this refusal in argument to the jury, directed toward impeachment of Martin's credibility as a witness.

(As reflected in *People v. Finch, supra*, 216 A.C.A. 495, 500, fn. 1, 30 Cal. Rptr. 901, 905, fn. 1, an objection by the defense to the proposed questioning was overruled, in view of which ruling defense counsel initiated the questioning.)

Summary of Argument.

The judgment rests on ample non-federal grounds. State procedure was followed at the trial within the permissible scope of such procedure; due process was not violated. In any event, the Fifth-Amendment privilege against self-incrimination should not be made applicable to the states through the Fourteenth Amendment to the United States Constitution. If, however, it is concluded that it should be made applicable, the judgment in the case at bar should stand since no fundamental unfairness has been demonstrated.

ARGUMENT.

I.

The Judgment Rests on Adequate Non-Federal Grounds.

Although petitioners urge that a constitutional issue is involved herein, we respectfully submit that the judgment rests on ample state grounds. It is well settled that a federal issue will not be reviewed if the judgment can be affirmed on the basis of a non-federal ground, *e.g.*, the exercise by a state court of state procedure properly vested in the state courts. (*Herb v. Pitcairn*, 324 U. S. 117, 125-126, 65 S. Ct. 459, 463; *Flournoy v. Wiener*, 321 U. S. 253, 262, 64 S. Ct. 548, 552-553; *Minnesota v. National Tea Company*, 309 U. S. 551, 554, 60 S. Ct. 676, 678.)

Questions pertaining to the admissibility of evidence generally fall within the category of the exercise by a state court of state procedure. (*Hughes v. Heinze*, 268 F. 2d 864, 866 (9th Cir.).)

At the trial in the Superior Court, both petitioners testified in the course of cross-examination that Captain Martin declined to testify before the Grand Jury and one of the petitioners acknowledged that Captain Martin's refusal was based on the privilege against self-incrimination. [Pet. App. C, pp. 1c-2c; Rep. Tr. pp. 3003-3005, 3579-3580.] This testimony was received without any objection whatsoever. It is the time honored rule in California that evidence which might otherwise be incompetent becomes competent when it is received without objection. (*People v. Mjlham*, 42 Cal. 2d 524, 526, 528, 267 P. 2d 1039, 1040, 1042; *People v. Close*, 154 Cal. App. 2d 545, 552, 316 P. 2d 1019, 1024.)

Accordingly, the fact of Captain Martin's having had an opportunity to testify before the Grand Jury and of his having refused to testify because of the privilege against self-incrimination was now before the jury in accordance with state procedure, at the time Captain Martin took the stand as a defense witness at the trial. His taking the stand and testifying as he did at the trial was inconsistent with his previous action.[1]

This inconsistency as it tended to impeach his credibility as a witness was the subject of comment by the Deputy District Attorney in the course of argument to the jury, as petitioners have noted. [Pet., App. C, pp. 11c-23c; Rep. Tr. pp. 4430-4437, 4449-4451, 4462-4467, 4849-4852, 4873-4880.] However, the comments were spoken by the deputy without any objection being interposed whatsoever. It would seem that if the defense felt the comments were at all undue or excessive, some sort of objection would have been interposed and the trial court would have been given an opportunity to take appropriate action. The failure to object to argument is akin to the failure to object to evidence. In California, a defendant may not complain on appeal of assertedly improper argument where the trial court could have alleviated the situation had an objection been interposed. *People v. Chavez*, 50 Cal. 2d 778, 793.

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[1] Unlike the defendant in *Grunewald v. United States*, 353 U. S. 391, 422, 77 S. Ct. 963, 983, stressed by petitioners, Captain Martin apparently did not reiterate his innocence before the Grand Jury. [Pet., App. C, pp. 11c-23c.] Nor does it appear that the defendant in *Grunewald* made such a self-impeaching acknowledgement as Captain Martin, that he (Martin) told the Grand Jury it was his wish not to answer questions on the ground such action might tend to incriminate him, but nevertheless he had not wished to answer to that body what truthful answers would have tended to incriminate him. [Rep. Tr. pp. 3803-3806.]

329 P. 2d 907, 910; *People v. Codina*, 30 Cal. 2d 350, 362, 181 P. 2d 881, 888.)

It bears emphasis that the questioning and remarks of which complaint has been made herein consumed a relatively small portion of the Reporter's Transcript containing in the neighborhood of 5,000 pages.

Thus, we strongly urge that petitioners' arguments dissolve in the face of ample non-federal grounds on which to sustain the judgment.

As the District Court of Appeal stated in its opinion (*People v. Finch*, *supra*, 216 A. C. A. 495, 500-501, 30 Cal. Rptr. 901, 905):

> "It appears that the court considered the fact of Martin's refusal to testify before the grand jurs on the ground of self-incrimination to be admissible for the purpose of impeachment. The court relied upon People v. Kynette, 15 Cal.2d 731 [104 P.2d 794] and People v. Wayne, 41 Cal.2d 814 [264 P.2d 547], as authority for the admission of the evidence of Martin for impeachment purposes. Defendants urge that the holding in Kynette and Wayne that the refusal of a witness to testify upon a former occasion upon the ground of self-incrimination is admissible as impeaching evidence was overruled in People v. Calhoun, 50 Cal.2d 137 [323 P.2d 427] and People v. Snyder, 50 Cal.2d 190 [324 P.2d 1]. The People reply that the latter cases held only that evidence of a former refusal to testify is inadmissible and not to be considered as indicating a consciousness of guilt or as a basis for a finding of guilt, and that

it was error to permit its consideration for those purposes. It is unnecessary for us to consider this point. Even if it was error to permit the questioned cross-examination of Martin defendants suffered no prejudice therefrom. Before Martin was examined Thiele was asked on cross-examination: 'Q. As a matter of fact, you know he [Martin] appeared before the Grand Jury and refused to testify, don't you?' and he answered: 'I do know that, yes, sir.' Finch was questioned on cross-examination as follows: 'Did you ask him what he had said before the Grand Jury? A. He told me why he didn't testify. Q. He told you that he had refused to testify on the ground of self-incrimination, didn't he? A. No, he didn't. Q. Now, at some time you did learn that it was a fact, though, didn't you? A. Yes.' There was no objection to this interrogation.

"By this testimony the jury was unequivocally made acquainted with the fact that Martin had refused to testify before the grand jury upon the ground of self-incrimination, and the only fact that was added in the examination of Martin was that in refusing to testify he was acting upon the advice of his attorney. If any prejudice resulted it was from the testimony of the defendants, to which no objection was made. The claim of prejudice cannot be sustained."

In other words, no fundamental unfairness appears and due process was not violated. *Uveseba v. California*, 314 U. S. 219, 230, 62 S. Ct. 280, 286. The judgment may be upheld on non-federal grounds.

II.

The Fifth Amendment Privilege Should Not Be Made Applicable to the States, but in Any Event Its Application Should Not Invalidate the Judgment Herein.

Assuming that a federal question should be deemed presented, it is respondent's position first that the Fifth Amendment privilege against self-incrimination should not be made applicable to the states through the due process clause of the Fourteenth Amendment, and that *Twining v. New Jersey*, 211 U. S. 78, 29 S. Ct. 14, and *Adamson v. California*, 332 U. S. 46, 67 S. Ct. 1672, should stand. While the factual situation in *Adamson* was different from that in the case at bar, we submit that the following conclusion in *Adamson* is an efficacious one: that a state may control the situation "in accordance with its own ideas of the most efficient administration of criminal justice . . . ." (*Adamson v. California*, *supra*, 332 U. S. 46, 57.)

It bears emphasis that within the relatively recent past *Twining* and *Adamson* were reaffirmed in *Cohen v. Hurley*, 366 U. S. 117, 127-129, 81 S. Ct. 954, 960-961.

In respondent's view, the historical record does not require this Honorable Court to hold that the Fifth Amendment privilege against self-incrimination was incorporated into the Fourteenth Amendment by virtue of the latter's adoption. (See *Fairman*, "Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding," 2 Stanford L.Rev. 5-139.) Nor does respondent believe that such departure from existing law is compelled by relatively recent decisions of this Court on other topics, *e.g.*, confessions

and searches and seizures stressed by petitioners. Surely the essence of the confession cases is that a state may not utilize an extrajudicial confession procured by inhumane methods. (See *Haynes v. Washington*, 373 U. S. 503, 83 S. Ct. 1336.) And surely it is the essence of the search and seizure cases that a state may not use evidence secured through unrestricted rummaging by the police, in the absence of consent or probable cause to arrest. (See *Ker v. California*, 374 U. S. 23, 83 S. Ct. 1623.) We submit that these cases do not add weight to the argument that *Twining*, *Adamson* and *Cohen* should be overruled.

Petitioner also stress *Chicago B. and Q. R. Co. v. Chicago*, 166 U. S. 226, 234-241, 17 S. Ct. 581, 584-586. They indicate that this case applied a portion of the Fifth Amendment (regarding the taking of property) to the states through the Fourteenth Amendment. We do not believe that this was the rationale of the opinion, but rather that the direct language of the Fourteenth Amendment applied. Hence, this case does not lend weight to the foregoing argument.

If, however, it is concluded that the Fifth Amendment privilege should apply to the states, questions arise as to the limits of its application. California Constitution, Article I, §13, provides similarly to the Fifth Amendment that no person in any criminal case shall be compelled to be a witness against himself. This provision is buttressed by Penal Code §§688 and 1323. The California Supreme Court in *People v. Snyder*, 50 Cal. 2d 190, 196-197, 324 P. 2d 1, 5-6 and *People v. Calhoun*, 50 Cal. 2d 137, 147, 323 P. 2d 427, 433-434, concluded that no implication of guilt could be drawn from a defendant's having refused to testify before the Grand Jury (or in another trial) on

the ground of self-incrimination. *Calhoun* and *Snyder* do not appear to have overruled earlier California decisions, *People v. Wayne*, 41 Cal. 2d 814, 829-830, 264 P. 2d 547, 555, and *People v. Kynette*, 15 Cal. 2d 731, 749-750, 104 P. 2d 794, 804, holding that a witness's claim of privilege before the Grand Jury may be used at the trial for impeachment purposes. This was what was done in the case at bar. Captain Martin was not a defendant in the action but merely a witness, and the questioning and comment relative to impeachment were in accord with state procedure under the state constitution and statutes. If application of the Fifth Amendment privilege to the states should invalidate such use of a witness's claim of privilege for impeachment purposes,[2] we nevertheless still submit that in view of the matters presented in Point I, above, no fundamental unfairness resulted in the trial which would constitute an infringement of due process (*Lisenba v. California, supra*, 314 U. S. 219, 236), and consequently the judgment should stand.

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[2] A basis for not invalidating California's use of a witness's claim of privilege before the Grand Jury for purposes of impeachment at the trial is found in the following circumstance: Under federal law a defendant in a criminal case is incompetent to testify at the trial or certain other proceedings not herein pertinent unless he waives his incompetency. ". . . [T]he person charged shall, at his own request, be a competent witness. . . ." (18 U. S. C. § 3481.) California goes further and extends the rule to grand jury proceedings. Penal Code section 1323.5 provides that "In the trial of or examination upon all indictments, complaints and other proceedings before any court, magistrate, grand jury, or other tribunal, against persons accused or charged with the commission of crimes or offenses, the person accused or charged shall, at his own request, but not otherwise, be deemed a competent witness. . . ." Thus, a person within the appropriate category need not be subject to impeachment at the trial.

Conclusion.

Respondent submits that an examination of the record, in light of the District Court of Appeal's opinion, discloses the absence of any substantial federal question. It is therefore requested that the petition for writ of certiorari be denied.

Respectfully submitted,

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